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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. SCOTT ALLEN SCHWEITZER, Defendant and Appellant.	C086895 (Super. Ct. Nos. SCCR-CRF-2016-1304 & SCCR-CRF-2017-1251)

In a plea proceeding, defendant Scott Allen Schweitzer pleaded no contest or guilty to assault with a deadly weapon with a great bodily injury enhancement (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a)),[1] and two counts of brandishing a deadly weapon (§ 417, subd. (a)(1)). In a subsequent plea proceeding, he pleaded guilty to two counts of assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), possession of a controlled substance in jail (§ 4573.6), two counts of possession of

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[1] Undesignated statutory references are to the Penal Code.

alcohol in jail (§ 4573.8), felony failure to appear (§ 1320, subd. (b)), five counts of resisting an officer (§ 148, subd. (a)(1)), battery (§ 242), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), misdemeanor failure to appear (§ 1320, subd. (a)), and admitted great bodily injury and strike allegations (§§ 12022.7, subd. (a), 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). He was sentenced to 15 years in state prison.

His sole contention on appeal is that his conviction should be conditionally reversed and the matter remanded to allow proceedings under the recently enacted section 1001.36 pretrial mental health diversion program. Finding section 1001.36 does not apply retroactively to nonfinal convictions, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal. We summarize the relevant procedural facts as follows.

Defendant's first plea, the assault with a deadly weapon and two brandishing counts in case No. SCCR-CRF-2016-1304, was entered on November 17, 2016. The plea included a *Cruz*[2] waiver. Defendant subsequently violated the *Cruz* waiver by failing to appear for sentencing, which led to new charges being filed. Defendant admitted the *Cruz* violation on January 31, 2017.

On February 14, 2017, defense counsel expressed doubts about defendant's competency to stand trial. The trial court referred defendant for a psychological evaluation pursuant to section 1369. According to the psychologists' reports, defendant had suffered brain damage, posttraumatic stress disorder (PTSD), and memory loss from an earlier gunshot wound to the head, which was compounded by early onset

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2 *People v. Cruz* (1988) 44 Cal.3d 1247.

polysubstance abuse, but he was nonetheless competent to stand trial. The trial court found defendant competent to stand trial and reinstated proceedings on March 14, 2017.

Defendant's second plea was entered on January 25, 2018. He was sentenced on March 1, 2018.

DISCUSSION

Defendant's sole contention on appeal is that he is entitled to seek pretrial diversion under section 1001.36 because that provision applies retroactively to convictions not final on appeal, such as his.

We conclude, in agreement with a recent opinion of the Court of Appeal, Fifth Appellate District (*People v. Craine* (2019) 35 Cal.App.5th 744, review granted Sept. 11, 2019, S256671 (*Craine*))[3] and other decisions, that the statute does not have retroactive effect as to cases, like this one, that had already reached the stage of conviction before the statute's effective date.

Section 1001.36, effective June 27, 2018, provides that a trial court, "[o]n an accusatory pleading alleging the commission of a misdemeanor or felony offense" (with exclusions not relevant here), may grant "pretrial diversion" to a defendant who meets all of the requirements specified in the statute. (§ 1001.36, subd. (a).) These include, among others, "a mental disorder . . . including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or [PTSD]," as established by "a recent diagnosis by a qualified mental health expert" (§ 1001.36, subd. (b)(1)(A)), and proof to the court's satisfaction that the mental disorder "was a significant factor in the commission of the charged offense" or "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

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[3] We may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

" '[P]retrial diversion' " as used in the statute means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

Since defendant entered his pleas and was sentenced before the effective date of the statute, he is entitled to its benefits only if section 1001.36 applies retroactively to him. In support of his retroactivity claim, defendant relies primarily on *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220 (*Frahs*). Although review was granted in *Frahs* after defendant filed his brief, as noted, we may still consider it as persuasive authority. (Cal. Rules of Court, rule 8.1115(e)(1).) However, for the reasons given in *Craine, supra*, 35 Cal.App.5th 744 (rev.gr.), we conclude *Frahs* was wrongly decided and the statute does not apply retroactively to persons, like defendant, "who have already been found guilty of the crimes for which they were charged." (*Craine,* at p. 754.)

The *Frahs* court decided whether section 1001.36 is retroactive by applying the standard retroactivity rules of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*). In *Estrada*, the court held that when the Legislature amends a criminal statute so as to lessen the punishment for the offense, it must be inferred that the Legislature's intent was to apply the lighter penalty to all cases not yet final. (*Estrada*, at pp. 745, 748.) In *Lara*, the court extended this rule to situations in which new legislation, though not lessening punishment, provides an " ' "ameliorating benefit" ' " for accused persons or constitutes an " 'ameliorative change[] to the criminal law.' " (*Lara*, at pp. 308, 309.) Taking these rules together, *Frahs* found that section 1001.36 confers an " 'ameliorating benefit' " on a class of

accused persons and therefore must be understood to work retroactively. (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev.gr.)[4]

The *Frahs* court rejected the Attorney General's argument that by expressly restricting its scope to the "postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c)), the statute set a temporal limit on its retroactive effect. (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev.gr.) The court reasoned: "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Ibid.*)[5] Concluding the issue could be resolved by applying *Estrada* and *Lara* to the plain language of the statute, the *Frahs* court denied the Attorney General's request for judicial notice of the statute's legislative history. (*Frahs,* at p. 789, fn. 2.)

In *Craine*, however, the court held that the *Frahs* analysis was flawed because it did not pay sufficient attention to how section 1001.36, subdivision (c) defines the timing

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[4] *Lara* summarizes *Estrada*'s holding as follows: " 'The *Estrada* rule rests on *an inference that, in the absence of contrary indications,* a legislative body *ordinarily* intends for ameliorative changes to the criminal law to extend as broadly as possible . . . .' " (*Lara, supra,* 4 Cal.5th at p. 308; italics added.) *Lara* then concludes that neither the language of the initiative under consideration (Proposition 57) nor the ballot materials rebutted the inference that the initiative was intended to apply retroactively. (*Lara,* at p. 309.)

In quoting *Lara*, the *Frahs* court omits the qualifying language we have italicized. Thus, *Frahs* in effect mischaracterizes the *Estrada*/*Lara* rule as one that applies automatically to all legislation conferring an "ameliorating benefit" on persons charged with crimes, regardless of any " 'contrary indications' " (*Lara, supra,* 4 Cal.5th at p. 308) in the legislation on its face or the legislative history (*Frahs, supra*, 27 Cal.App.5th at p. 790, rev.gr.).

[5] *Frahs* did not address the first part of the statutory language quoted by the Attorney General (which is misstated as " ' "postponement *or* prosecution" ' "). (*Frahs, supra,* 27 Cal.App.5th at p. 791, italics added, rev.gr.)

of the "ameliorative benefit" it confers. In other words, *Frahs* did not properly consider either the phrase "postponement of prosecution" or the phrase "until adjudication," instead relying only on a mechanical application of the *Estrada* and *Lara* rules.[6] (*Craine, supra*, 35 Cal.App.5th at pp. 754-756, rev.gr.)

As to the phrase "until adjudication" (§ 1001.36, subd. (c)), *Craine* pointed out that " '[t]he purpose of [diversion] programs [in the criminal process] is precisely to *avoid* the necessity of a trial.' [Citation.]" (*Craine, supra*, 35 Cal.App.5th at p. 755, rev.gr.) In other words, absent clear statutory language showing otherwise, it makes no sense to say that a defendant can be given the benefit of "pretrial diversion" after a case has already gone through trial to conviction (or its equivalent, a guilty or no contest plea). (*Ibid.*)

By the same token, the meaning of the phrase "the postponement of prosecution" (§ 1001.36, subd. (c)) depends on the normal usage of "prosecution" in the criminal process. As the *Craine* court found, "[P]rosecution is synonymous with 'criminal action,' and it means ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment." ' " (*Craine, supra*, 35 Cal.App.5th at pp. 755-756, rev.gr.) "A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' " (*Id.* at p. 756.)

Therefore, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone." (*Craine, supra*, 35 Cal.App.5th at p. 756, rev.gr.)

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6 See footnote 4, *ante*.

According to *Craine*, *Lara* is distinguishable because the ameliorative benefit discussed there (the initial processing of accused juveniles in juvenile court, and trial in adult court only upon transfer) did not create a temporal bar to retroactive relief, as does section 1001.36. (*Craine, supra,* 35 Cal.App.5th at pp. 756-757, rev.gr.)

Craine also examines the legislative history of section 1001.36 (which *Frahs* refused to consider) and finds that it points to the same conclusion. The history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly " '*to avoid unnecessary and unproductive costs of trial and incarceration.*' " (*Craine, supra,* 35 Cal.App.5th at pp. 758-759, rev.gr. [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2-3].)

As *Craine* points out: "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings. Since mental health services are already available to parolees . . . , it is hard to imagine the Legislature intended for additional court resources and public funds to be expended on 'pretrial diversion' assessments at such a late juncture." (*Craine, supra,* 35 Cal.App.5th at p. 759, fn. omitted, rev.gr.)

The structure of the relief provided by the statute also indicates that the Legislature intended to grant such relief only prospectively. In addition to the precise definition of "pretrial diversion" found in section 1001.36, subdivision (c), which we have already discussed, we note the following:

The period allowed for pretrial diversion is limited to a maximum of two years. (§ 1001.36, subd. (c)(3).) The defendant must prove he has a qualifying mental disorder that would respond to treatment; this proof must include "a recent diagnosis by a

qualified mental health expert" (what constitutes "recent" is undefined) who may rely on "any . . . relevant evidence" including examination of the defendant, the defendant's medical records, and arrest reports, inter alia. (§ 1001.36, subd. (b)(1)(A), (C).) Once the defendant has met this burden, the trial court must determine whether the defendant's mental disorder was "a significant factor in the commission of the charged offense" by reviewing "any relevant and credible evidence," including all of the evidence considered by the mental health expert and more. (§ 1001.36, subd. (b)(1)(B).) At the end of the two-year diversion period, if the defendant has "performed satisfactorily" according to specified criteria, the court "shall dismiss the . . . criminal charges that were the subject of the criminal proceedings at the time of the initial diversion" and the defendant's record shall be expunged. (§ 1001.36, subd. (e).)

It would greatly strain scarce judicial resources to extend this complex scheme to persons who have already gone through the criminal process to the point of conviction. When added to the " 'contrary indications' " (*Lara, supra,* 4 Cal.5th at p. 308) contained in the statutory definition of "pretrial diversion" and the legislative history, this consideration compels the conclusion that section 1001.36 was not intended to have retroactive application.

The Sixth Appellate District likewise rejected retroactive application of section 1001.36 in *People v. Khan* (2019) 41 Cal.App.5th 460. The Court of Appeal accepted the Attorney General's argument that *Frahs* was wrongly decided and pretrial diversion, as used in section 1001.36, meant " 'the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment,' subject to all of the specified requirements." (*Khan,* at p. 488.)

Furthermore, even if the double jeopardy issues could be solved through conditional reversal, the *Khan* court was "not convinced that the reasoning in *Lara* applies or that the statutory language of section 1001.36 structurally supports

defendant's position." (*People v. Khan, supra*, 41 Cal.App.5th at p. 491.) Although the defendant in *Lara* had been charged with an information in adult court, "there had been *no* trial and *no* conviction in adult court." (*Khan,* at p. 491.) Unlike the retroactive application of section 1001.36, the retroactive application of Proposition 57 in *Lara* "does not require courts to maintain a fiction that an alleged crime had never been adjudicated. Rather, if after retroactively conducting a transfer hearing the juvenile court finds that it would *not* have transferred the person to criminal adult court, the court must treat the adult convictions as juvenile adjudications." (*Khan,* at p. 492.) Agreeing with *Craine*, the Court of Appeal found section 1001.36 was not retroactive to nonfinal convictions. (*Khan,* at pp. 493-494.)

For the reasons stated in *Craine* and *Khan*, we disagree with *Frahs* and find that "pretrial diversion" under section 1001.36 is not available to defendant because he has already been tried, convicted, and sentenced.

DISPOSITION

The judgment is affirmed.

/s/
Butz, J.

I concur:

/s/
Murray, J.

ROBIE, J., Dissenting.

I respectfully disagree with the majority's conclusion that the recently enacted Penal Code[1] section 1001.36 pretrial mental health diversion program does not apply retroactively to nonfinal convictions. As noted in the majority opinion, this question has vexed the Courts of Appeal and resulted in a splintering of the appellate districts and, as seen here, of justices sitting on the same court. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220; *People v. Weir* (2019) 33 Cal.App.5th 868, review granted June 26, 2019, S255212; *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted Oct. 9, 2019, S257049; *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738; and *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted Nov. 26, 2019, S258541 with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671; *People v. Torres* (2019) 39 Cal.App.5th 849; and *People v. Khan* (2019) 41 Cal.App.5th 460.)

While we wait for our Supreme Court to weigh in and provide guidance, I step into the bramble thicket and throw my support behind *Frahs* and multiple other courts in concluding that a defendant may be considered for mental health diversion under the statute if his or her conviction is not yet final.

I add, however, that a defendant raising the issue for the first time on appeal must show that the statute *may* apply to him or her before the requested relief can be granted. In this regard, I disagree with cases finding remand appropriate solely because the record discloses the defendant "appears to meet at least one of the threshold requirements, namely, he suffers from a diagnosed mental health disorder." (*People v. Weaver*, *supra*, 36 Cal.App.5th at pp. 1121-1122; see *People v. Frahs*, *supra*, 27 Cal.App.5th at p. 791.) I believe a defendant must show the judgment results in a miscarriage of justice because

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[1] All further section references are to the Penal Code unless otherwise specified.

he or she was not given the opportunity to seek a mental health diversion eligibility hearing under section 1001.36. (Cal. Const., art. VI, § 13.)

Here, I conclude defendant has shown the statute may apply to him and, thus, remand would be appropriate for the trial court to conduct a mental health diversion eligibility hearing.

Preliminarily, however, I address a jurisdictional argument raised by the People and not addressed by the majority -- that is whether defendant was required to provide a certificate of probable cause under section 1237.5. This question is no less contentious or prickly than the question of retroactivity. (See, e.g., *People v. Stamps* (2019) 34 Cal.App.5th 117 [certificate unnecessary], review granted June 12, 2019, S255843; *People v. Baldivia* (2018) 28 Cal.App.5th 1071 [same]; *People v. Hurlic* (2018) 25 Cal.App.5th 50 [same]; but see *People v. Alexander* (2019) 36 Cal.App.5th 827, 843 (conc. & dis. opn. of Needham, J.) [certificate necessary], review granted Oct. 16, 2019, S257190; *People v. Galindo* (2019) 35 Cal.App.5th 658 [same], review granted Aug. 28, 2019, S256568; *People v. Fox* (2019) 34 Cal.App.5th 1124 [same], review granted July 31, 2019, S256298.) I agree with the *Stamps*, *Baldivia*, and *Hurlic* line of cases that, absent language in the plea agreement incorporating only the law in existence at the time of execution, a certificate of probable cause is not required for a defendant to seek the benefit of a retroactive ameliorative law on appeal if his or her conviction is not yet final.

I

Certificate Of Probable Cause Not Required

The People argue defendant's appeal should be dismissed because "[a] defendant who agrees to a specified maximum sentence [in a plea agreement] may not file an appeal challenging the trial court's legal authority to impose that sentence without first obtaining a certificate of probable cause." In my view, the fact that the parties stipulated to a specific term does not insulate the plea agreement from future changes in the law that the Legislature intended to apply retroactively. (*Harris v. Superior Court* (2016) 1 Cal.5th

984, 987 [the defendant who pled no contest to grand theft offense in exchange for stipulated six-year sentence could petition to reduce his conviction to a misdemeanor and recall his sentence under subsequently enacted Proposition 47 and the People were not permitted to rescind the plea agreement and reinstate dismissed charges].)

"Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made" (*People v. Hurlic*, *supra*, 25 Cal.App.5th at p. 57), "the general rule in California is that the plea agreement will be ' "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . . " ' " (*Doe v. Harris* (2013) 57 Cal.4th 64, 66). Although the parties to a particular plea bargain might affirmatively agree that the consequences of the plea will remain fixed despite amendments to the relevant law (*Harris v. Superior Court, supra,* 1 Cal.5th at p. 991), courts will not amend a plea agreement to add such a provision (*Hurlic*, at p. 57). I have found nothing in the record showing defendant's plea agreement contains a term incorporating only the law in existence at the time of execution and decline to infer such a provision on appeal.

Moreover, dispensing with the certificate of probable cause requirement under the present circumstances would not run afoul with the underlying legislative purposes for requiring the certificate in the first place; i.e., to facilitate and encourage plea agreements and " 'weed out frivolous or vexatious appeals.' " (*People v. Hurlic*, *supra*, 25 Cal.App.5th at pp. 57-58.)

I conclude defendant's plea agreement is deemed to incorporate a retroactive subsequent application of a law, allowing him to raise such an argument on appeal without the need not obtain a certificate of probable cause.

II

Defendant Has Shown Section 1001.36 May Apply To Him

The next pertinent question is whether defendant has shown section 1001.36 may apply to him (i.e., that he may fall within the class of persons who may seek discretionary relief under the statute) such that, if the statute applies retroactively, he would be entitled to remand for the trial court to conduct a mental health diversion eligibility hearing.

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573), and we shall not set aside a judgment unless we find "the error complained of has resulted in a miscarriage of justice" (Cal. Const., art. VI, § 13). As this court explained in *Waller*, "[p]rejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) Here, the error complained of is that defendant was not given the opportunity to seek a mental health diversion eligibility hearing under section 1001.36.

Section 1001.36 provides pretrial diversion may be granted if the trial court finds all of the following criteria are met: (1) the defendant suffers from a recently diagnosed mental disorder enumerated in the statute; (2) the disorder was a significant factor in the commission of the charged offense, and that offense is not one of the offenses enumerated in subdivision (b); (3) "[i]n the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment"; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if treated in the community. (§ 1001.36, subd. (b)(1)-(2).)

"At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3).)

I disagree with *Frahs* and *Weaver* that a defendant meets his or her burden of demonstrating a miscarriage of justice occurred merely by arguing he or she has a diagnosed mental health disorder within the meaning of section 1001.36, subdivision (b)(1)(A), as defendant attempts to do here. (See *People v. Frahs*, *supra*, 27 Cal.App.5th 784; *People v. Weaver*, *supra*, 36 Cal.App.5th at pp. 1121-1122.) Rather, I find it appropriate to require a defendant to show that he or she *may* fall within the class of persons who may seek discretionary relief under the statute such that affirming the judgment would result in a miscarriage of justice. Practically speaking this means a defendant must meet the requirements of section 1001.36, subdivision (b)(3) -- that is, showing he or she "will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion."

Here, defendant explains he suffers from mental illness including a qualifying mental disorder -- post-traumatic stress disorder. (§ 1001.36, subd. (b)(1)(A).) He states his mental illness "possibly may have been exacerbated even further" when he was "attacked and beat up by" one of his victims; he stabbed the victim "when he later ran into [him]" because "he was afraid [the victim] was going to attack him again." This connects defendant's qualifying mental disorder with the commission of one of the charged offenses. (§ 1001.36, subd. (b)(1)(B).) Defendant further explains he has been treated with medication for his post-traumatic stress disorder by a jail psychiatrist, suggesting his symptoms may respond to treatment. (§ 1001.36, subd. (b)(1)(C).) And,

he points out he was not charged with any of the crimes that would disqualify him from consideration for diversion. (§ 1001.36, subd. (b)(2).) His convictions also are not super-strike offenses within the meaning of section 667, subdivision (e)(2)(C)(iv) to establish an "unreasonable risk of danger to public safety" as defined in section 1170.18. (§ 1001.36, subd. (b)(1)(F).) Finally, defendant's appeal requesting an opportunity to seek diversion indicates he will likely consent to diversion and treatment. (§ 1001.36, subd. (b)(1)(D)-(E).)

Given that defendant has shown he *may* fall within the class of persons who may seek discretionary relief under section 1001.36, I next consider whether the statute applies retroactively such that remand is appropriate for the court to conduct a mental health diversion eligibility hearing.

III

Section 1001.36 Is Retroactive

As a general rule, statutes are presumed to apply prospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307.) Where, however, a statute reduces the punishment for a crime or a class of persons, an "inference of retroactivity applies" to cases not yet final on appeal. (*Id.* at p. 303, citing *In re Estrada* (1965) 63 Cal.2d 740.) This " 'rule rests on the inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, at p. 308.) Potential contrary indications include "a saving clause or other indicia of a contrary legislative intent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) " '[W]hat is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' " (*Ibid.*)

No one disputes, as far as I am aware, that section 1001.36 is an ameliorative change to the criminal law; indeed, it ameliorates the possible punishment for persons

with certain mental disorders, if the mental disorder was a significant factor in the commission of a nonexcluded offense. (§ 1001.36, subds. (a), (b), (e).) The principal dispute is whether the definition of pretrial diversion in section 1001.36, subdivision (c), presents a clear contraindication of retroactivity. The majority believes it does; I disagree.

I do not quibble regarding the statute's language. The definition of pretrial diversion indeed contemplates that diversion, if any, should occur prior to adjudication. But, does the *definition* clearly signal the Legislature's intent to make section 1001.36 prospective? (*People v. Nasalga, supra,* 12 Cal.4th at p. 793.) To this question, I must answer, "no"; and, agree with *Frahs* that the definition merely reflects "how this particular diversion program is ordinarily designed to operate." (*People v. Frahs, supra*, 27 Cal.App.5th at p. 791.)

Indeed, "the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara, supra,* 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*People v. Frahs, supra,* 27 Cal.App.5th at p. 791.) The absence of an express discussion of the "timing" language of Proposition 57 in *Lara* does not, in my mind, create a material distinction. "The relevance of the timing language in [Proposition 57 and section 1001.36] is that it reflects legislative intent as to how the new procedure will *normally* operate. If that intent is not enough to dictate prospective application in *Lara* as to Proposition 57, [I] do not see how it can require prospective application as to mental health diversion in section 1001.36. And to reject *Lara* on the basis that a decision is not authority for a proposition not specifically discussed would be to conclude that the Supreme Court reached the wrong result because it overlooked crucial statutory language. Absent further guidance from our high court, [I] believe our institutional role compels us to . . . [apply] *Lara* to permit

retroactive application of section 1001.36." (*People v. Burns*, *supra*, 38 Cal.App.5th at p. 787.)

The majority next relies on *Craine*'s discussion of the legislative history of section 1001.36, stating it "makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly" for cost savings. (Maj. opn. *ante*, at p. 7.) I believe the express statutory purpose set forth in section 1001.35 is more instructive and clearer. Section 1001.35 states: "The purpose of this chapter is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders."

The Legislature's express purposes in section 1001.35, subdivisions (a) and (c) would be furthered by retroactive application of section 1001.36. "A similar legislative purpose, to stop the revolving door of criminal justice for juveniles, was found in *Lara* to 'support the conclusion that *Estrada*'s inference of retroactivity is not rebutted.' " (*People v. Burns*, *supra*, 38 Cal.App.5th at p. 788.) While the Legislature may have considered the cost savings of section 1001.36 when it enacted the statute, I do not find the legislative history in that regard to *clearly* signal the Legislature's intent to make section 1001.36 prospective. (*People v. Nasalga*, *supra*, 12 Cal.4th at p. 793.) The Legislature spoke clearly of its intent in section 1001.35, and its *express* intent does not overcome the normal application of *Estrada*; it supports it.

Finally, I find no merit in the argument that retroactive application of the statute would implicate double jeopardy principles. The conditional reversal utilized in *Frahs* appropriately obviates any such concern. (See *People v. Frahs*, *supra*, 27 Cal.App.5th at p. 796.) If a defendant is found ineligible for diversion on remand or is found eligible

and later violates diversion, the judgment would be reinstated without the need for a new trial.

Under the existing tapestry of our Supreme Court's analysis on retroactivity, I believe section 1001.36 applies retroactively to benefit a defendant whose case is not yet final. Thus, I would conditionally reverse the judgment and remand the cause to the superior court with directions to conduct a diversion eligibility hearing no later than 90 days from the filing of the remittitur.

/s/
Robie, Acting P. J.